TALAM LEASING SDN. BHD.

v.

BATU WONG KOON SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
GUNN CHIT TUAN J
[CIVIL SUIT NO. C3315 OF 1985]
18 MARCH 1988

CIVIL PROCEDURE: *Sale of goods - Appeal against refusal of Senior Assistant Registrar to allow summary judgment - Equipment lease agreement - Whether there were latent defects in equipment - Fundamental breach - Whether exemption clause applied.*

This was an appeal against the decision of the Senior Assistant Registrar who dismissed an application for summary judgment under O. 14 Rules of the High Court 1980 in respect of a claim under an equipment lease agreement for arrears of rental. The respondents contended that the equipment was not of merchantable quality and that they were not fit for the purpose for which it was obtained. The appellant contended that the defence was without any merit as the respondents had operated the equipment and had paid lease rentals even after service of the writ summons. There was evidence by way of affidavits to show that there were frequent breakdown of equipment which had to be sent for repair. It was alleged that the defects were latent. There was an exemption clause in the agreement.

Held:

[1] In this case, evidence must be adduced at a trial to determine whether the defects in the plant were latent which could not be discovered by ordinary vigilance and examination. It has also to be determined by the Court whether the hirer in this case was competent as required to discover the latent defects in the said equipment.

[2] There was an issue as to whether the exemption clause applied if there was a fundamental breach of the implied condition that the equipment was of merchantable quality and fit for the purpose of which it was obtained.

[3] The Court agreed with the decision of the learned Senior Assistant Registrar in refusing to grant the plaintiff's application to enter final judgment against the defendants as the Court found the issues should be tried.

[Appeal dismissed with costs.]

Cases referred to:
Seng Hin v. Arathoon Sons Ltd. [1968] 2 MLJ 123
Dorothy Kwong Chan v. Ampang Motors Ltd. [1969] 2 MLJ 68
Credit Corporation (Malaysia) Bhd. v. K.M. Basheer Ahamed & Anor. [1985] CLJ (Rep) 94
Suisse Atlantique Societe D'Armament Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale [1967] 1 AC 361

Legislation referred to:
Sale of Goods (Malay States) Ordinance 1957, s. 42.
Rules of the High Court 1980, O. 14.

Other source referred to:
Supreme Court Practice 1979, Vol. 1, p. 143

For plaintiff/appellant - Shamsul-Bahrain b. Ibrahim; M/s. Skrine & Co.
For 1st to 6th defendants/respondents - Charles W.Kraal; M/s. Paul Chong & Kraal

JUDGMENT

Gunn Chit Tuan J:

This was an appeal from the decision of the learned Senior Assistant Registrar given on 27 February 1986, when she refused to grant the plaintiff's application to enter final judgment against the defendants for the sum of RM994,051.80 together with interest thereon at the rate of 0.065% per centum per day from 6 May 1985, to the date of payment and costs.

According to Encik Shamsul-Bahrain, Counsel for the plaintiff, the defendants admitted that an Equipment Lease Agreement was entered into between the plaintiff and the 1st defendant on 12 September 1984, whereby the plaintiff leased to the 1st defendant one unit 120 tons/hour skid-mounted crushing and screening plant for a total lease rental of RM1,195,080 payable in advance by 12 monthly instalments of RM20,000 p.m. commencing on 12 September 1984, and thereafter on each succeeding month followed by 36 monthly rentals of RM26,530 each (para. 3 of the amended statement of claim). Counsel contended that the defendants were therefore bound by the terms and conditions contained in the said agreement and had raised only one issue which merited consideration, namely, that the equipment was not of merchantable quality and fit for the purpose for which it was obtained. It was also contended that the defendants' allegation was not true and was baseless because the said equipment was delivered by the suppliers and assembled at the 42nd mile, Kuala Kubu/Gap Raod, Kuala Kubu Baru, Selangor, in May 1984, and on 14 September 1984, the 1st defendant had informed the plaintiff that the equipment was working satisfactorily and only a balance of 5% of the purchase price need be retained by the plaintiff for a period of two weeks to allow the suppliers to make minor adjustments. On 24 October 1984, the 1st defendant instructed the plaintiff to release the said balance of the purchase price. The 1st defendant paid the monthly instalments and the last payment was credited into the plaintiff's account on 31 July 1985. That last payment was made after the writ of summons had been served on the defendants. It was therefore contended that if the said equipment was not of merchantable quality the defendants would not have made the last payment on 31 July 1985, and after having used the equipment for more than 14 months.

Encik Shamsul-Bahrain then referred to s. 42 of the Sale of Goods (Malay States) Ordinance, 1957 which is as follows:

> The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Reference was then made by him to *Seng Hin v. Arathoon Sons Ltd.* [1968] 2 MLJ 123 in which case concerning the sale of goods it was held that in order to show that the goods were not of a merchantable quality, it had to be shown that the goods were of no use for any purpose for which such goods would normally be used and were therefore not saleable under that description. Counsel then contended that the claim of the defence that the equipment was not of merchantable quality and not fit for the purpose for which it was obtained could not, in the circumstances, hold any water because the defendants operated the equipment and paid lease rentals even after they had been served with the writ of summons and that was evidence to show that the equipment was fit for the purpose for which it was intended.

Although the plaintiff's application by way of summons-in-chambers dated 1 October 1985, (encl. 5) was to enter final judgment against the defendants under O. 14 of the Rules of the High Court, 1980, and was not an application to strike out the defendant's counter-claim, yet in his written submission Counsel contended that there was no creditable basis for the defendant's counterclaim. He stated that the defendants were estopped from denying that the plant was capable of attaining an output of 120 tons per hour as the 1st defendant had covenanted that no liability was attached to the plaintiff either in contract or in tort for loss, injury or damage sustained by the 1st defendant or by any third party by reason of any defect in the equipment, whether such defect was latent or apparent on examination. It was contended that the plaintiff as a finance company was entitled to rely on the clauses in the Equipment Lease Agreement which excluded liability of the plaintiff.

Reference was also made to the case of *Dorothy Kwong Chan v. Ampang Motors Ltd.* [1969] 2 MLJ 68. In that case a finance company bought a motor car from the dealers and let it out on hire purchase to the appellant who pleaded that it was an implied term of the contract that the said car should be reasonably fit for the purpose for which it was hired and that in breach of the term the said car was not fit and that consequently she was entitled to repudiate the agreement. The finance company pleaded that since the appellant had an opportunity to examine and test the said car before signing the agreement, the implied condition of reasonable fitness (which was denied) did not avail the appellant. The appellant filed a reply to the finance company's defence and counterclaim in which she averred that she was neither competent nor required to discover latent defects in the said car and she relied on he skill and judgment of the respondents as to the said car being fit for the purpose for which it was hired. Raja Azlan Shah J (as he then was) held that the appellant might originally have had some claim in damages against the finance company for the defective condition in which she found the vehicle but for the fact by a clause in the agreement the finance company excluded liability which they could lawfully do so. The defect was not so serious as to constitute breach of a fundamental terms so that the exception clause applied in favour of the finance company. Counsel contended that on the facts of the present case there was no breach of the implied stipulation and prayed that the counterclaim be dismissed with costs and that the plaintiff be at liberty to enter final judgment against the defendants.

Mr. Kraal, Counsel for the defendants, submitted that the defendants have said that the plant was not of merchantable quality. He referred to an affidavit (encl. 12) of one Wong Chan Poh who said that he was the director and manager of the 1st defendant. Annexed to his said affidavit (marked WCP-IA to 1J) were copies of the 1st defendant's computer printout of the time and duration during which the said plant had broken down from the months of October 1984, to July, 1985. Wong further averred that he was personally in charge of the said plant at all material times and had monitored the recordings of each breakdown daily and had personally entered the data contained in the said Exhibits WCP-IA to 1J into the 1st defendant's computer which was kept at its site office in Kuala Kubu Baru, Selangor. He pointed out that it could be seen from the said Exhibits WCP-1A to 1J that the said plant had broken down practically every week and after each break down an oral complaint was made to the plaintiff and/or its agents to come and repair and/or replace any damaged parts. In response to those complaints the plaintiff and/or it agents did sent their mechanics to repair the said plant. Notwithstanding those repairs the 1st defendant had on several occasions to seek the help of other mechanics as the repairs carried out by the plaintiff and/or its agents were not satisfactory. Copies of receipts showing the expenses incurred by the 1st defendant for further repairs were also exhibited and marked WCP2 to 5. The deponent averred

that the said repairs were not general maintenance repairs but represented a series of latent defects which rendered the said plant to be not of merchantable quality and fit for the purpose for which it was obtained. It was further averred that because of the several breakdowns the said plant was incapable of attaining an output of 120 tons per hour as warranted and pleaded in the plaintiff's statement of claim. The 1st defendant has therefore counterclaimed for that breach of condition. It was submitted by Mr. Kraal that the defendants had a valid counterclaim which has not been attacked in Court. He then referred to the following passage in p. 143 of the *Supreme Court Practice* 1979, Vol. I:

> Moreover, where the defendant sets up a *bona fide* counterclaim arising out of the same subject-matter of the action, and connected with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counterclaim, but should be for unconditional leave to defend, even if the defendant admits the whole or part of the claim (*Morgan & Son Ltd. v. S. Martin Johnson & Co.* [1949] 1 KB 107, CA (Whole claim admitted); *Court v. Sheen* [1891] 7 TLR 556 (part of claim admitted); see also *Hanak v. Green* [1958] 2 QB 9, CA; *Bankes v. Jarvis* [1903] 1 KB 549). In such circumstances, such admission is to be treated as being subject to the counterclaim, which might then turn out to be larger in amount (see *Andrews v. Stewart* [1876] WN7). Although a counterclaim is (for many purposes) a cross-claim, for the purpose of O. 14 it ought to be treated as a defence (per Cotton LJ in *Zoedone Co. v. Barrett* [1882] 26 SJ 657, CA).,

and submitted that the defendants had a counterclaim which was connected with their defence and also submitted that the defendants should therefore be allowed unconditional leave to defend. Counsel then referred the Court to the following paras. 8 and 9 of the defence and counterclaim of the 1st to 6th defendants (encl. 8):

> 8. By reason of the constant break down in the plant, the 1st to 6th defendants were unable to obtain the represented 120 tons per hour crushing capacity and still continue to be unable to obtain the required crushing capacity.
>
> 9. In the premises the 1st to 6th defendants have suffered loss particulars of which have been calculated for a period of ten (10) months from October 1984 to July 1985 and are as follows:
>
> **PARTICULARS**
>
> Rated capacity of Equipment ... 120 tons per hour
>
> Actual capacity achieved ... 16.935 tons per hour
>
> **PROFIT EARNED**
>
> @ 24,000 tons per month 24,000 x RM11.19 per ton (average selling price)
>
> Rated production per month
> 120 tons per hour x
> 8 hours per day x
> 25 working days per month ... (24,000 tons per month)
>
> Actual production achieved in October 1984-July 1985
> (10 months) ... (3,387 tons per month)
>
> RM268,560

LESS: Direct cost of running the plant 24,000 x RM6.20 per hour	RM 148,800	
Expected profit for one month	RM 119,760	RM 119,760
@ 3,387 ton per month 3,387 x RM11.19 per ton (average selling price)	RM37,900.53	
LESS: Direct cost of running the plant 3,387 x RM6.20 per hour	RM20,944.40	
Actual profit for one month	RM16,901.13	RM 16,901.13
Loss of profit for one month		RM 102,858.87
Loss of profit for ten (10) months		RM1,028,588.70

and submitted that the defendants' counter claim was equal to or exceeded the plaintiff's claim.

Reference was then made to the following paragraph in the judgment of the Federal Court in *Credit Corporation (Malaysia) Bhd. v. K.M. Basheer Ahamed & Anor.* [1985] CLJ (Rep) 94 @ 97:

> At common law, it is usual to exclude the lessor from contractual liability arising from the implied terms as to fitness and quality. This is because the equipment is selected from the manufacturer or distributor by the lessee who requests the lessor to buy it and then lease it to him. The lessee takes on the responsibility of checking the condition of the equipment at the time of delivery, and normally accepts it on the lessor's behalf. The lessor gives no warranty to the lessee as to the fitness of the equipment, but were there is no direct contractual arrangement between the lessee and the supplier, there is normally provision in the lease for action to be taken by the lessor on the lessee's behalf against the supplier. (See *Leasing* by T.M. Clark, pp. 72, 83 & 84). This is required because since the lessor is the buyer and the legal owner of the goods, he has privity of contract with the manufacturer or supplier. Under the Sale of Goods (Malay States) Ordinance (No. 1 of 1957), there is an implied warranty or condition as to quality and fitness of goods supplied under certain contracts of sale. There is also an implied condition that the goods shall correspond with the description. (See s. 15 and 16). In case of any breach of warranty, s. 59 provides remedy to the appellant as the buyer not only to reject the goods but also to set up the breach by diminishing or extinguishing the price or sue the seller for damages for breach.

Counsel stated that in this case there was no privity of contract between the suppliers and the defendants who had therefore to rely on the plaintiff to repair the said plant. Finally he pointed out that this was not a case of a contract for the sale of goods but was a contract for the lease of equipment but Encik Shamsul in reply still submitted that s. 42 of the Sale of Goods (Malay States) Ordinance 1957, applied to this case.

The first issue on the pleadings that has to be determined by the Court is whether there were any latent defects in the plant which defects could not be discovered by ordinary vigilance and examination. It has also to be determined by the Court whether the hirer in this case was competent or required to discover the latent defects in the said equipment. *Dorothy Chan's* case (*supra*) is therefore distinguishable as Raja Azlan Shah J (as he then was) found that the defect in that case was not so serious as to constitute a breach of a fundamental term so that the exemption clause applied in favour of the finance company. But in the present case the nature of the latent defects in the said equipment has yet to be determined by the Court after considering evidence which must be adduced at a trial.

Another issue which must be considered is whether the equipment in this case was of merchantable quality and fit for the purpose for which it was obtained and it is also necessary for the Court to consider whether there was in this case a breach of the implied condition as to quality and fitness under s. 7 of the Hire-Purchase Act, 1967, or under the rules of the common law. And finally, it must be considered whether there could in this case be any exclusion of the said implied condition. Whether or not any particular exclusion clause is sufficient to relieve the lessor of liability depends upon whether the clause in question, construed in the light of its wording and the commercial or other purpose of the contract, was intended by the parties to cover the liability which it is sought to exclude. Moreover, if there was a fundamental breach of the contract the question whether an exception clause is applicable is one of true construction of the contract concerned (*Suisse Atlantique Societe D'Armament Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*) [1967] 1 AC 361.

Having considered the submissions of Counsel as well as the abovementioned issues which I considered should be tried, I then agreed with the decision of the learned Senior Assistant Registrar in refusing to grant the plaintiff's application to enter final judgment against the defendants and therefore dismissed the appeal with costs.

Also found at [1988] 1 CLJ 702